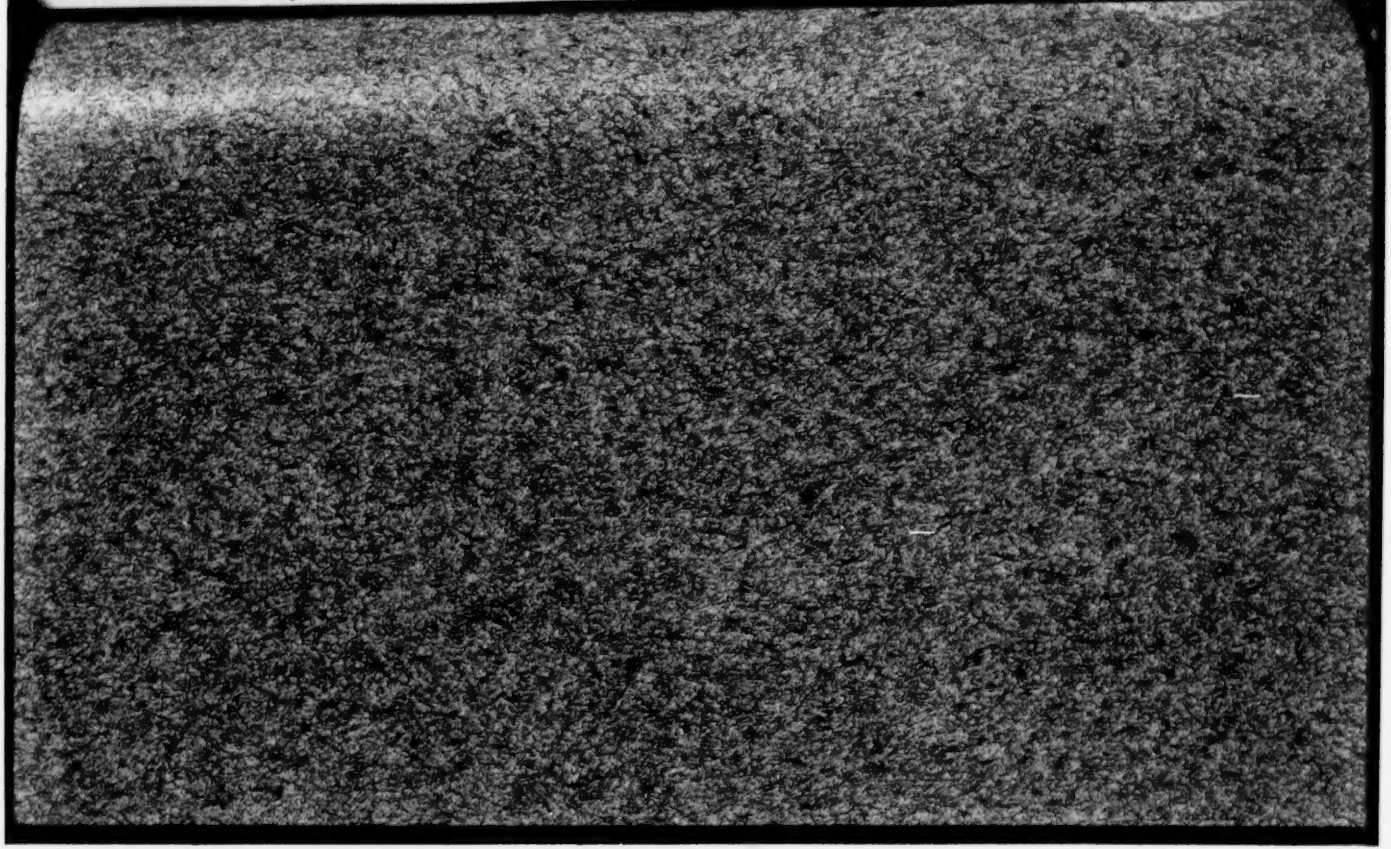
Supreme Court of the United States.

PETITION OF PLAINTIFF IN ERROR FOR REHEARING.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

DIAMOND GLUE COMPANY, *Plaintiff in Error,* vs. **THE UNITED STATES GLUE COMPANY,** *Defendant in Error.*	In Error to the Circuit Court of the United States for the Eastern District of Wisconsin

PETITION OF PLAINTIFF IN ERROR FOR REHEARING.

The plaintiff in error, the Diamond Glue Company, respectfully asks for a rehearing of the questions involved in this case.

The case was argued orally and submitted for decision on the 17th day of December, 1902, just before the holidays. The opinion was handed down January 5, 1903, less than three weeks after the argument. We feel that the contentions of the plaintiff in error did not receive the attention they deserved from the court and were in part overlooked and in part misapprehended. In consequence, the court rendered an opinion which we believe denies plaintiff in error its constitutional rights; sets up a precedent which this court will find itself unable to follow and must necessarily over-

rule at some future time; and, contrary to a decision of the Wisconsin Supreme Court, gives a construction to a Wisconsin law which the legislature never intended.

The suit was brought by an Illinois corporation to recover damages for an anticipatory breach by a Wisconsin corporation of the terms of a contract providing that the Illinois corporation should act as selling agent for the Wisconsin corporation. The defense was that other provisions of the contract required the Illinois corporation to do business in Wisconsin—not in selling goods, but in connection with their manufacture—and that the Illinois corporation had not complied with the terms of the foreign corporation statute of Wisconsin enacted before, but going into force some time after the contract between the two corporations was made. The case was tried before Judge Seaman and a jury, and at the close of plaintiff's evidence a peremptory instruction was given for the defendant. Plaintiff's evidence tended to show that it had carried out all the provisions of the contract to be by it performed, *except in so far as they had been waived by the defendant*, and that the plaintiff had not since September 1, 1898, the day when the statute went into force, done any business in Wisconsin contrary to the terms of the statute.

The Mistake of this Court in Applying the Statute to the Facts of the Case.

There are only two provisions of the Wisconsin statute which can, under any circumstances, affect contracts made by foreign corporations or their performance. The first is the provision that no corporation "shall transact any business, or acquire, hold or dispose of property" in Wisconsin

before compliance with the statute. The second is the provision that every contract made by a foreign corporation "affecting the personal liability thereof, or referring to property within this state" before compliance with the statute "shall be held void on its behalf." (See Wisconsin Statute, pp. 18-20, our original brief.) The first provision has reference solely to acts *done in Wisconsin after September* 1, 1898, and in consequence can only be infringed by acts done *after that date*. In regard to it the *terms* of the contract are entirely immaterial. In regard to the second provision, the terms of the contract would be allimportant, were it not that, as is admitted, no contract made before September 1, 1898, could infringe that provision.

Yet the court dwells upon and sets out the *terms* of the contract between the United States Glue Company and the Diamond Glue Company made before September 1, 1898, as if they had some bearing upon the question whether there was a breach of the provisions of the statute forbidding the *transaction of business* after that date. The opinion does not point out any business transacted by the Diamond Glue Company in Wisconsin contrary to the terms of the statute, nor does it state that the Diamond Glue Company did so transact business; in other words, it does not show a single violation of the statute. The contract itself being made before the statute was in effect did not violate it. It does not appear that in performance of the contract there was any violation of the statute. How, then, can the statute be a defense to a suit on the contract?

It might be answered that the Diamond Glue Company was bound by the contract to perform acts against the statute, unless it first complied with the statute, but certainly the court cannot assume that the Diamond Glue Company

would not have complied with the statute before performing those acts, especially as the court insists that the compliance with the statute is easy and formal. Moreover, among the numerous defenses set forth in the answer of the United States Glue Company there can be found no complaint that the Diamond Glue Company failed in carrying out that part of the contract which, as the court has interpreted it, required it to do business in Wisconsin. If the contract is to be held broken by such non-performance on the part of the Diamond Glue Company, it should have been pleaded. That it was not pleaded certainly shows that the United States Glue Company did not complain of such inaction. (See defendant's answer, Rec., 7-15.)

Had the United States Glue Company written to the Diamond Glue Company before September 1, 1898, to the effect that on account of the statute it would not expect the Diamond Glue Company, in performance of the contract, to transact any business in Wisconsin, and would waive the performance of such acts in so far as they were required by the contract until further notice, we do not think the court would hold that the statute was a defense to the present action, yet the opinion is entirely consistent with such a supposition; it must therefore be unsound.

While, in fact, the United States Glue Company did not so write to the Diamond Glue Company, the position taken by it accomplished the same result. The building of the factory was done by the United States Glue Company, and when the factory was erected, not only did the United States Glue Company not expect the Diamond Glue Company to take charge of it, or even to take charge of the handling of the products of the factory, but it immediately took charge of all the operation of the factory itself and regarded the

Diamond Glue Company simply as an advisor. (See our original brief, pp. 6-7, 96; Rec., 57, 59, 62, 89.) In other words, whether the acts of the United States Glue Company be regarded as an interpretation of the contract, or as a waiver of some of its provisions, it cannot be denied that the Diamond Glue Company was not called upon or expected to manage the factory or control the products and that it did not do so.

Yet the opinion commits the logical fallacy of regarding the Wisconsin statute as violated by the terms of a *contract* made *before* the statute was in force. The opinion says:

> "It did assist in operating by its officers and did supply a superintendent, and *whether in his superintendence he in fact acted as agent for the plaintiff or defendant, what the contract required is plain.*"

The sentence quoted not only contains the error in reasoning above pointed out, but does an absolute injustice to the plaintiff in its implied assumptions. It assumes that any assistance rendered by the officers of the Diamond Glue Company, even by advice as to running of the factory, would be a transaction of business in Wisconsin. Is the court willing to commit itself so far? Think of the result! No officer of a foreign corporation could give advice as to the running of a plant or the doing of any business by a domestic corporation without rendering his own corporation liable to fine! In the above quotation there is a further injustice done. The court implies that perhaps the superintendent of the factory was acting as the Diamond Glue Company's agent. The testimony was all the other way; *it must be remembered that the case comes up after an instruction in defendant's favor at the close of the plaintiff's testimony, therefore, it is not the province of this court, nor was it of the Circuit*

Court, to weigh the testimony. It was the duty of both courts to believe the testimony given, except in so far as it was either impossible or contradicted itself.

The gist of the opinion heretofore filed, so far as it concerns the applicability of the statute to the performance of the contract, is contained in these words:

> "It hardly could be contended that the contract was illegal, on the ground just stated, when it was made. If indeed it had contemplated the plaintiff's going on without complying with the statute it would have raised a question which we need not discuss. But it must be taken to have contemplated legal action, and if filing a copy of its charter was a condition precedent of the plaintiff's right to carry out its undertakings, then a promise might be implied on its part to take the necessary steps. But if, *when the time came*, the plaintiff did not take those steps, the defendant had the legal right to refuse to go on, whether its right be put on the ground of the plaintiff's breach of its implied undertaking or of the illegality of the proposed continuance of the work."

This might all be admitted and yet it would not affect the case for the reason that *the time never came*. The time referred to must be the time when the plaintiff was called upon to do business in Wisconsin. Before that time it cannot be pretended that the Diamond Glue Company was under any obligations to register as a foreign corporation seeking to do business in Wisconsin. What were the acts which the contract required, according to the court's own interpretation, the plaintiff should do in Wisconsin? Obviously to manage the factory, etc. Therefore the plaintiff was not required to register in Wisconsin as a foreign corporation until it was its duty to manage the factory. This duty the court would say arose when the factory was ready to go into operation, or perhaps when it was built, but it is just there that the rea-

soning of the opinion fails on account of its *misapprehension* of the facts. The duty of the plaintiff under the contract was a duty running to the defendant. If the defendant chose to dispense with or postpone the performance of that duty the plaintiff was not bound to perform it. Whether the defendant did so dispense with or postpone performance was at least a question of fact for the jury. Yet the opinion says that because the letter of the contract required the plaintiff, unless properly registered, to break the law, therefore the plaintiff did break the law. The opinion gives contracts a force and sacredness hereto unknown, in that it makes them efficient to compel the parties to do acts which both of them are willing to leave undone. We had supposed that a valid contract between two parties was for the benefit of one or the other, or both, but it now seems that a contract exists for its own benefit and, against the will of both parties to it, can drive one of them into an infraction of a penal statute.

The opinion says, concerning the contract and its performance:

> "The plaintiff was to have the management of the manufacturing, was to operate the factory, or at least to assist in operating it, and to keep it supplied with a superintendent. It did assist in operating by its officers and did supply a superintendent, and whether in his superintendence he in fact acted as agent for the plaintiff or the defendant, what the contract required is plain."

In other words, the court expressly says that the test of the illegality of plaintiff's acts is not *what the plaintiff did*, but *what the contract*, as made, not as performed, *required*.

The words quoted might seem to point out ways in which the plaintiff had actually done business in Wisconsin contrary to the statute, but in fact no such business was done.

The assistance shown by the record was not the maintenance in Wisconsin of people who actually helped in doing the work of operating the factory. It was simply the giving advice by the Diamond Glue Company as to the best methods of performing the various operations of the factory. Sometimes the advice was given by an officer or employe of the Diamond Glue Company, who went up to Wisconsin to look over the factory. (Rec., 54, 57.) Often it was by letters from Chicago. (Rec., 81, 83.) Furnishing a superintendent was simply sending a man across the state line, who, on arriving in Milwaukee, or at the factory, entered into the employ of the defendant. None of these acts taken singly, nor all of them together, show so conclusively as to authorize taking the questions from the jury—nor indeed can be held to have the slightest tendency to show—that the Diamond Glue Company was "doing business" in Wisconsin. See *Kilgore* v. *Smith*, 122 Pa. St., 48, 54. They were such acts as any selling agent might do. No commands were given in Wisconsin by officers or agents of the Diamond Glue Company. The Diamond Glue Company did not keep in Wisconsin a single employe or officer; it did not have a dollar there invested. Rec., 42, 45, 46, 57.) If the acts mentioned constitute a "doing business" in violation of the statute, then it would be unsafe for any foreign corporation contemplating doing business in Wisconsin to send an officer or agent there to look over the ground.

"Doing business" by a foreign corporation in this connection is held to mean doing the ordinary business of the corporation. See:

Sullivan v. *Lumber Co.*, 103 Ala., 371, 380.
Beard v. *U. & A. Publishing Co.*, 71 Ala., 60, 62.

Morgan & Co. v. *White*, 101 Ind., 413.

Utley v. *Clark-Gardner Mining Co.*, 4 Col., 369, 375.

Thompson on Corporations, Vol. 6, Par. 79, 36.

It cannot be imagined that the giving of advice or the furnishing of a superintendent, or both together, would have been regarded by the Wisconsin courts as subjecting the Diamond Glue Company to a fine of $500. Yet, if the Diamond Glue Company is not subject to fine, it has not broken the statute.

That the statute contemplated not the casual giving of advice or suggestions but the actual management of enterprises or at least the making of contracts is evident from its language:

> "No corporation * * * shall transact any business, or acquire, hold or dispose of property in this state until such * * * corporation shall have caused to be filed in the office of the secretary of state a duly authenticated copy of its charter * * * and all amendments thereto which may be made while it shall continue to do business therein."

The decision of the court amounts to this: The defendant and plaintiff made a contract—valid when made—containing a number of superfluous provisions as to the management of defendant's factory by the plaintiff, which were inserted for no one knows what reason, and were ignored absolutely by both parties, in their subsequent dealings. The performance of these ignored clauses, except on conditions not fulfilled, afterward became illegal; therefore, the defendant is released from its contract, even though there has been no attempt to perform the ignored clauses nor any desire on the part of the defendant that they should be performed. This

reasoning certainly cannot be supported. The result reached by the court not only fails to follow necessarily from the facts—it has no relation to them.

Interstate Commerce.

The error of the court in confusing the terms of the contract made before the statute went into effect with possible violations of the statute after it went into effect is strikingly obvious in the treatment given our contention that the matter concerning which suit was brought was interstate commerce. We quote from the opinion:

> "The foundation of the commerce outside the state was doing business within it. The superintendence and manufacture had to come before the sale. The small requirements of this act before allowing the plaintiff to do business within the state, if good as to that business taken by itself, are not made bad by the presence in the contract of an ulterior term which the plaintiff might or did intend to carry out by transporting the products of the business elsewhere."

The facts are these: The breach of the contract for which suit was brought was refusal to allow the Diamond Glue Company to go on with interstate commerce; that is, to sell the products of the factory from its offices in Chicago and elsewhere outside the State of Wisconsin. It is said that in the performance of other parts of the contract the Diamond Glue Company was breaking the law of Wisconsin. The testimony shows that the Diamond Glue Company was not breaking the law of Wisconsin, although it had previous to the going into effect of the law made a contract, in performance of which it might have broken the Wisconsin law, according to the interpretation of that law by the opinion. How can the *terms of that contract* be a defense to an action brought for refusal to allow

the Diamond Glue Company to do interstate commerce? And yet it is the terms of the contract and not the acts done under it which the court discusses in this connection. No control of the factory by the Diamond Glue Company is mentioned anywhere in the opinion; not an instance is pointed out where the Diamond Glue Company was doing business in Wisconsin, and yet, because the terms of the contract, validly drawn, provide that it should do business there, the court regards those terms as equivalent to its actually doing business, even when the actual doing of business not only did not exist, but was not desired by the other party to the contract.

We are unable to understand the reasoning which lead the court to hold that the interstate commerce carried on under this contract was not protected by the United States Constitution. The court says:

> "It is said that the contract in suit, as carried out, was concerned in part with interstate commerce, and therefore was free from the operation of the Wisconsin statute. The portion of the contract that called for the carrying on of business in Wisconsin was not so concerned, and the inseparable provisions as to selling left it to chance or extrinsic business considerations whether the contemplated traffic should go outside the state or not."

It is to be observed that the opinion assumes that it was by chance only that the selling of the product of this glue factory became interstate commerce. We cannot see that that makes any difference. We do not understand that the protection afforded interstate commerce by the United States Constitution depends upon the length of time which it takes to plan that commerce, or whether it is chance or other considerations that lead to its being interstate commerce.

The evidence all shows that at the time of the making of

the contract the Diamond Glue Company was selling glue entirely from its home office and branch offices outside the State of Wisconsin, and therefore it was not a subsequently arising chance, but a probability understood by the parties that the glue should be so sold. The main object of the contract, certainly the only object so far as the Diamond Glue Company was concerned, was the selling of the glue and grease to be manufactured. It was contemplated that this selling should be interstate commerce. The evidence shows that the glue and grease sold entered into interstate commerce.

But the court says it was by chance. According to the same reasoning it would be by chance and a chance beyond the control of the Diamond Glue Company that the factory was located in Wisconsin, for the contract itself only provides on that subject that the site was to be selected by the United States Glue Company. (Rec., 76.) Yet the opinion says: "It was understood that the proposed factory was to be in Wisconsin," and proceeds to treat the contract as if it required the factory to be in Wisconsin and therefore, that the contract required the Diamond Glue Company to comply with the Wisconsin law. May we not justly insist that if the understanding, which the court finds existed, that the factory should be in Wisconsin, be incorporated into the contract, the further understanding, which stands out even more clearly from the evidence, that the product should be sold from the offices of the Diamond Glue Company *already established,* and therefore that interstate commerce was contemplated, should be read into the contract. There is a homely phrase that "what is sauce for the goose is sauce for the gander."

But why is it necessary to read into the contract any pro-

vision that does not appear in its wording? Suppose the United States Glue Company, which had the sole power of selecting the factory, had chosen to locate it in Illinois, say at Waukegan; would the Diamond Glue Company not have then been bound to perform its share of the contract just as much as if the factory were located in Wisconsin? If this is so, then it was surely no condition of the contract that the Diamond Glue Company should comply with the Wisconsin law, and therefore, its not so complying with the Wisconsin law was no breach of any condition of the contract. The United States Glue Company could hardly be given the capacity to add conditions to the contract by acts done after the contract was made.

Thus, by reasoning suggested by the opinion itself, it is obvious that that part of the opinion which regards compliance with the Wisconsin law as an implied condition of the existence of the contract is without logical foundation. The court in defense of its opinion is then thrown back upon the proposition advanced by counsel for the United States Glue Company that the acts of the Diamond Glue Company were such as compelled the United States Glue Company, in carrying out the contract, to join with the Diamond Glue Company in a breach of the Wisconsin statute. This certainly is far fetched! In the first place, the United States Glue Company had the right to do business in Wisconsin and therefore anything it did in Wisconsin was not a breach of the statute. In the second place, even had the contract been made subsequent to September 1, 1898, by express provisions of the contract, the United States Glue Company could have held the Diamond Glue Company to performance, though not *vice versa*. In the third place, there is the perfectly conclusive answer that, as the Diamond Glue Company was not at the

time of the breach of the contract, or before then, engaged in business in Wisconsin, as it owned no property there and employed no agents there, it was not violating the statute, and therefore the United States Glue Company could not be joining the Diamond Glue Company in violations.

Any Right the Defendant May be Supposed to Have Had to Repudiate the Contract was Waived.

In order to allow the defendant to repudiate this contract on account of the provisions of the statute it is necessary both that the law should be in force and that the Diamond Glue Company should be breaking its provisions. If either of these conditions was lacking the statute cannot furnish a defense to the United States Glue Company. The record shows beyond question that at the time the United States Glue Company refused to be further bound by the contract, and for some time before that, during which period it had recognized the contract as binding and acted under it, the Diamond Glue Company was doing nothing whatever in Wisconsin. It had no agent there—it had no property there. The superintendent whom it had sent there was then not in its employ, but in the employ of the United States Glue Company and upon the termination of its contract remained with the latter. (Rec., 42, 45, 47.) This termination in no way affected the Diamond Glue Company except that thereafter it could not sell from Chicago the glue manufactured by the United States Glue Company. In other words, at the time of the breach of the contract by the defendant, and for some time previous, the plaintiff was doing nothing in any way obnoxious to the Wisconsin statute. Suppose, however, as is intimated by the court, the furnishing of a superintendent four months

before the breach of the contract was in violation of the statute, even though it was interstate commerce. That act of the plaintiff if it gave the defendant an excuse to repudiate the contract, certainly did not give it the choice of carrying on the contract as long as it wanted and then repudiating it. Whether a violation of the statute is looked upon as a breach of the implied conditions of the contract or not, it is obvious that the defendant if it desired to take advantage of it must have taken advantage of it immediately; it could not experiment with the plaintiff to see how it was coming out and carry matters along until it owed the plaintiff some thousands of dollars for commissions actually earned and then turn back to this old so-called breach and says, "Because you once did an illegal act, though you are now doing nothing against the law, we cannot further carry out our contract with you.

If the defendant ever had a right to repudiate that, right must have been exercised before the plaintiff is put in worse position, or else it *was waived.*

We presented this point somewhat at length in our original brief in this case, yet it was not noticed in the court's opinion. (See brief, pp. 91-98.) To our minds this shows that our case did not receive the attention which it merited from this court. The contention must have been overlooked. It could not otherwise have been passed over in silence.

The Circuit Court Invaded the Province of the Jury in giving a Peremptory Instruction in the Case.

It is well established law that a trial judge should not give a peremptory instruction to the jury to find for the defendant where there is any evidence, even though contradicted, which fairly tends to support the allegations of fact

necessary to plaintiff's case. Nevertheless, Judge Seaman decided for himself, without submission to the jury, in the face of all the evidence, that plaintiff was violating the statute at the time of the breach of the contract.

We realized that this assertion may seem incredible, but it is nevertheless true, and it is a matter which, while we pointed it out in our brief, has been entirely overlooked by this court. *There is not a scintilla of evidence to show that the Diamond Glue Company had at or about the time of the breach, or indeed at any time, done acts in Wisconsin which would subject it to fine under the provisions of the Wisconsin statute.* Yet the opinion filed, affirming the judgment of the Circuit Court, convicts the Diamond Glue Company, in effect, of a penal offense against a law of Wisconsin when the record shows no offense against such law, except, forsooth, in acts done before the law was in force.

The opinion goes on the entirely untenable theory that the contract made before September 1, 1898, gave color to acts done after that date, so as to turn the doings of an employe of the United States Glue Company into transactions by the Diamond Glue Company. The facts make it clear beyond doubt that the plaintiff did not manage defendant's factory, therefore it could not have violated the Wisconsin statute in that respect. The plaintiff is defeated because this statute forbade plaintiff to do, not what it did, but what it did not!

Is this court willing by its opinion to support the remarkable proposition that a penal statute can be broken by a contract made before the statute is in force? It must be clear that neither a man nor a corporation can violate a statute except by acts done subsequent to the going into force of the statute and within its territorial jurisdiction.

In a criminal case there would be no need even to state such a proposition. Yet in this case this court and the Circuit Court have ignored it completely and have regarded a valid contract made before the statute was in force as conclusive evidence that the plaintiff has violated the statute.

Had there been no contract between the parties, no one would be found rash enough to assert that the Diamond Glue Company had in anything done by it, as shown in the record, rendered itself liable to fine under this statute. How then can the existence of the contract previously made change the situation?

But it is said there is a contract and the suit is brought on this contract. This is true, *but the defense considered is not one of non-performance of the contract, but of breach of the statute, and if the statute is not broken by acts of the plaintiff the defense must fall.*

All these considerations have a special bearing on the claim of the Diamond Glue Company for commissions already earned, amounting, as pointed out in our former briefs, to the sum of over three thousand dollars. Our claim for these commissions already earned was not apparently considered by the court at all. The only thing said in the opinion that could apply to this part of our case is the following:

> "But the contract was an entire contract, as both parties agree, and therefore whatever the defendant had in mind, if it was justified by the law, in refusing to perform a material part, it was justified in refusing to perform any portion."

It will be noted that this claim is not for damages on account of the defendant's refusing to perform in the ordinary sense, but for commissions earned on business transactions which the plaintiff had already performed so far as

performance was required by it. Therefore, the whole reasoning of the opinion has no application to this claim. Whether or not the unexecuted parts of the contract were rightly put an end to by the defendant, as the court says, still the defendant could hardly absolve itself from paying the plaintiff an indebtedness already accrued under the executed part of the contract. *The contract was valid*, therefore, whether its further performance had become invalid or not, all executed claims arising under it were enforcible at law.

The idea that the contract was an entirety does not affect this. The contract was an entirety on any hypothesis only in so far as neither party had a right without the concurrence of the other to break any part of it and insist on performance of the rest, but it was not an entirety in so far as the payment of the Diamond Glue Company was concerned. The Diamond Glue Company was to receive a commission of ten per cent. *upon sales as made*. That this was understood by the defendant is shown by the fact that the commissions were in part paid. In this respect the contract was similar to one by which a servant is hired for a year to be paid monthly. He has a right to receive payment for the months already completed even though he may be rightfully discharged before the year is out. And, as we must again call to the court's attention, the utmost, on the court's own reasoning, that was shown in this case was the right by the United States Glue Company to discharge the Diamond Glue Company. There was no right to declare the contract void *ab initio*.

The Opinion Overrules Bedford v. Eastern B. & L. Association, 181 U. S., 227.

The opinion of the court in this case seems directly contrary to *Bedford* v. *Eastern B. & L. Ass'n.*, 181 U. S., 227. The opinion clearly implies that even if the Wisconsin law had been enacted after the making of the contract, still it would have afforded a defense to a suit brought for its breach. In the Bedford case it was distinctly held that where a statute is passed imposing conditions upon the further doing of business in a state by a foreign corporation, the foreign corporation must, whether it complies with the law or not, carry out its contracts already made. The court in that case says (p. 241):

> "It might indeed have the right to decline any condition and retire from the state, and from all it had the option to retire from. *But it could not retire from the execution of its contracts.* It contracted with Bedford to make him a loan if it had the means in its treasury and his security was good. The state could not affect that obligation nor impair it. 'The obligation of a contract is the law which binds the parties to perform their agreement.'"

And again:

> "We recognize the power of the state to impose conditions upon foreign corporations doing business in the state. We have affirmed the existence of that power many times, *but manifestly it cannot be exercised to discharge the citizens of the state from their contract obligations.*"

This case is absolutely in line with *Security Savings & Loan Ass'n.* v. *Elbert*, 153 Ind., 198, which is brushed aside in the opinion, and certainly is absolutely irreconcilable with the reason given by the court for its decision in this case. This opinion if allowed to stand must be regarded by

other courts, and by the profession at large, as directly overruling the Bedford case.

The Court has entirely Misapprehended our Argument as to the Unconstitutionality of the Statute as Applied to Section 2, Article 4 of the United States Constitution.

The last paragraph of the opinion deals with our contention that the statute was unconstitutional as infringing the provisions of the United States Constitution that guarantees to citizens of each state the privileges and immunities of citizens of the several states. It may be remarked that the opinion refers to this as "Article 2, Section 4," instead of Section 2, Article 4. The court assumes that our argument is based merely upon the application of the statute as originally enacted to partnerships, and answers that the act of the legislature changing the statute in striking out the word "partnerships" by an amendment enacted after the parties had entered upon performance of the contract showed that the provisions as to corporations in the original statute were distinct from those of partnerships and therefore that the former could stand even though the latter were unconstitutional. (See our original brief, pp. 19, 20.)

But we did not found our argument merely upon the inclusion of "partnership" within the restriction of the statute, but upon the express inclusion also of common law joint stock companies and voluntary associations formed in other states. The amendatory act left still effective the restriction of these by the statute. If the act was unconstitutional as to partnerships—and the court does not deny it—it is unconstitutional as to common law joint stock companies and as to voluntary associations of all natures operating

without a charter. If, as the court says, the amendment of the legislature in striking out partnerships showed that it was its intention two years before to treat partnerships and corporations severally, the amendatory act in leaving in joint stock companies and voluntary associations showed just as plainly that it was the intention of the legislature to treat foreign corporations as in the same class, and that even after its attention was called to the unconstitutionality of its enactment in regard to unincorporated bodies it was ready to leave the rule in regard to corporations and that in regard to voluntary associations and joint stock companies to stand or fall together.

The court states no reasons and cites no authorities as to why it regarded the provision as to corporations as being separable from the other provisions of the statute. A single purpose is evident in the statute, both as originally enacted and as amended, and that is the treatment of all organizations, whether chartered or otherwise, organized outside of the State of Wisconsin, alike, and the imposition of the same restrictions upon them. As these restrictions must be held unconstitutional as to some of them and as the court cannot give effect to the intention of the Wisconsin legislature, is not the court assuming legislature powers itself in practically recasting the law so as to treat in separate classes what the legislature intended should be treated in the same class?

The Question of Impairment of Contract Obligations.

What we have said heretofore was in discussion of such parts of the opinion as had any bearing upon the application of the statute irrespective of its interpretation and irrespective of its constitutionality. In the discussion

of the question whether the application of a statute to this contract offends against the United States Constitution as impairing the obligations of the contract, the opinion seems to us to confound the question whether a party can contract in such a way as to *restrict legislation* of the state, with the question whether the legislation of a state can be so *applied* as to impair the obligations of a party's contract. The opinion also apparently regards a small impairment of the obligations of the contract as no impairment. No logical distinction can exist between holding that failure by one party to a contract to pay $25 releases the other from the contract any more than the failure to pay $25,000. The court seems to be unduly impressed with the fact that here it is a foreign corporation that is raising the question of the unconstitutionality of the application of a certain statute. Suppose the contract had been between two individuals, and the statute had provided that no contract, the performance of which should last longer than a year, should be valid unless reduced to writing and recorded with a payment of a fee of $25. The case would be precisely analogous, yet we cannot believe that this court, or any other court in the country, would hold that such a statute could have application to a contract validly enacted before the statute was passed. Could it make any difference that here a foreign corporation is concerned and not an individual?

Toward the bottom of page 3 of the court's opinion we find these words:

> "Again, we need not consider in its full breadth whether or how far, * * * a corporation, by making a contract reaching years into the future, can exonerate itself from all police or license laws."

This is certainly absolutely unfair to our case and to our

contentions. A law authorizing foreign corporations to do business in a state is certainly not a police regulation. It effects neither the health nor the morals nor the safety of the people. Ever since the Dartmouth College case it has been supposed that giving a charter to a corporation was not an exercise of police powers, but was an act of ordinary legislation, or else the making of a contract. General incorporation laws are affected by the same rules as private acts of incorporation and general laws prescribing the terms on which foreign corporations can do business are not in this respect different. A state cannot contract away police powers. It can grant inviolable charters to corporations. Even where the charters granted for the regulation of the corporations are not contracts they nevertheless cannot be regarded as partaking of the nature of police regulations, or else when they were contracts they would still partake of that nature and not be binding on the state.

The opinion is in error in assuming that we have contended that a corporation by making a contract contemplating a series of years could absolve itself from the police or license laws of the state. As we expressly pointed out in our brief, the question is not between the State of Wisconsin and the Diamond Glue Company. We are not contending that this contract releases the Diamond Glue Company from the obligations to obey the laws of Wisconsin as to all business done there. What we do contend is that the laws of Wisconsin cannot be stretched to relieve the defendant in error from the obligations of its contract, valid when made.

This Court has Overruled the Supreme Court of Wisconsin in the Construction of Wisconsin Law.

The point in the whole opinion which seems to show to us most clearly that our case has not received the attention it merits or the mature consideration of the court is that in the opinion filed the court has disregarded the well-known rule that the Supreme Court of the United States in construing the statute of a state will follow the rules of construction used by the Supreme Court of that state. The court has run counter to the vast weight of authority as to the construction of a clause in a statute suspending its operation until some future date, including the only three cases found by counsel for either party, in which a contract made between the enactment and the going into force of a statute is considered. We refer to

National Home Building & Loan Ass'n v. *Black*, 153 Ind., 701.

Cargill v. *Powers*, 1 Mich., 369, 370, and

Mix v. *Vail*, 86 Ill., 40.

In the first two of these cases the "suspension clause" is contained in the statute itself, as in the case at bar. In fact, *Cargill* v. *Powers* is still more nearly like the case at bar, because the act in that case was part of "revised statutes," which did not go into effect until the year after they were enacted.

In regard to our authorities the opinion says in this connection:

> "Statements made with a different intent in some decisions, to the effect that suspended statutes are to be read as if passed on the day when they go into operation, do not apply to a case like this. Such statutes

can be read in that way for the purpose of the operation which is suspended, but not for all."

The writer of the opinion must have overlooked the two first cases above cited, where, in so far as this point is concerned, the facts are absolutely analogous. In the following cases also, the "suspension clause" is contained in the act itself. Therefore, if the "suspension clause"—following the reasoning of the opinion—had been in effect, all persons would have been notified of the provisions of the act and the decisions would have had to be different.

Commonwealth v. *Fowler*, 10 Mass., 290, 300.

Larrabee v. *Talbott*, 5 Gill. (Md.), 426, 441.

State v. *Bond*, 49 N. Car., 9.

Dewart v. *Purdy*, 29 Pa. St., 113, 117.

State v. *Messmore*, 14 Wis., 163, 175.

In the other cases cited by us in our brief the provisions suspending the operation were a part of the constitution of the state or provisions of another general law. Consequently, in those cases the "suspension clause" was necessarily in force in spite of its effect in postponing the act, and yet, in those cases, the fact that the "suspension clause" was in force did not operate to give notice of the provisions of the acts which it might suspend.

Jackman v. *Garland*, 60 Me., 133.

Sammis v. *Bennett*, 32 Fla., 458, 460.

Charliss v. *Lamberson*, 1 Ia., 435, 443.

Rice v. *Rudiman*, 19 Mich., 125, 135, and *Mix* v. *Vail*, above mentioned.

Of course, the implied reasoning of the opinion is obvious—the "suspension clause" being in force, as it says,

is notice that at a future date a certain body of laws,—if they are not repealed or modified, or amended, before that time,—will be in force. But, where, as in the case at bar, the statute is contained in an entire revision of the statute law of the state, it would not seem to be a very definite notice to each of the enactments. At any rate it did not so appear to the courts in *Cargill* v. *Powers,* and *State* v. *Bond, supra,* to have that effect. There does not seem to be a very strong distinction between such a "suspension clause" contained in a general revision of the statutes, and such a "suspension clause" as we have in Illinois to the effect that all acts of the legislature, unless an emergency clause is attached, shall go into force the first day of July after their enactment. According to the reasoning of the opinion, the well known existence of such a provision in our constitution must keep all the inhabitants of the state on the *qui vive* in regard to the doings of the legislature from day to day, as laws may be enacted, which though they are not to have effect until the first of July following, nevertheless, may be binding upon the citizens before that date. See, however,

Mix v. *Vail, supra.*

It is universally agreed that one of the objects of postponing the going into effect of a statute is to enable the citizens of the state to become acquainted with its provisions so that they shall not be taken by surprise and have the law affecting their daily dealings suddenly changed. But the interpretation given by the opinion to the "suspension clause" in this case nullifies that purpose completely. The instant the Wisconsin revised statutes were enacted everybody was bound to take notice of them in spite of the provision giving them a year or so to get acquainted with them,

for anything done by them which might have effect after September 1, 1898, was likely to be nullified by the statute. It may be said that if any arrangements were to be made extending after that date, in such case, the parties making them could look up the law. But that contains the fallacy of charging all citizens of Wisconsin and *all doing business there* with notice that there is a law to look up, and so defeats the purpose of the legislators in postponing the operation of the law. If all the people in spite of the postponement of the operation of the law are required to take notice of its postponed operation at the moment of its enactment, no satisfactory reason can be given for its postponement. It is to be presumed that the new law is an improvement over the old, or it would not be enacted. If, then, a period before its going into effect is not to be allowed the people for getting acquainted with it, but they are immediately given notice of its provisions, by the very fact that it is postponed, then it would certainly be better to put those provisions of which they have notice into force immediately.

If a legislature desired to give citizens of a state a year or a month or a week to become acquainted with the provisions of the law, during which intervening time they were not to be charged with notice of it in any of their transactions, would not such legislature in carrying out such purpose add a simple clause postponing the taking effect of the law? As it is universally agreed that the laws in force when contracts are made enter into its obligations and that these obligations cannot be impaired by an act of the legislature, if a statute enacted, but not in force, becomes part of the obligations of a contract, as the opinion implies, what becomes of the obligations in case the statute is repealed before it ever becomes a law? The rule laid down by the court

leads to the dilemma, either that a law enacted after the contract is made affects the contract and therefore impairs its obligations, or that an act never in force as law nevertheless entered as law into the interpretation of a certain contract.

But we realize that this court is in a position, if it chooses, to disregard in the construction of this statute all decisions outside of the State of Wisconsin that bear on the subject. They are authorities, it is true, and they seem all one way, but they would not be absolutely binding on the Supreme Court of Wisconsin and they cannot be binding on this court. But the decision of the Supreme Court of Wisconsin in similar cases is binding in the construction of a Wisconsin statute. In *State* v. *Messmore, supra*, so far as the constitutionality of the "suspension clause" is concerned, the facts are precisely like those in the case at bar. In that case the act was approved March 30, 1861, was published April 4, 1861, and *by its terms* went into effect April 10, 1861. The court says (page 175):

> "We do not, however, hold that the *judge was bound to take notice of the change* or prepare to remove until the act was to go into actual operation. In these times of fluctuating and uncertain legislation, it would be enough that he prepared for the contingency when it actually happened. * * * For aught that he knew or might suppose, *the law might have been repealed, or further suspended*, before the day fixed for its taking effect."

When, therefore, the Wisconsin Supreme Court has said that a judge of a court of general jurisdiction is not bound to take notice of the terms of an act before it goes into effect, is it not acting in utter disregard of the rule of construction laid down by that court to hold that a foreign corporation is bound to take notice of the terms of an act of Wisconsin before it goes into effect? As the Wisconsin court well remarks, it may be repealed before that time comes.

This court has repeatedly held that where the Supreme Court of a state has construed the state constitution or legislation as authorizing the making of certain contracts, then it was not at liberty to declare other similar contracts, made after such decisions, invalid on account of such constitution or legislation. For if a court were allowed so to shift its construction, citizens who have entered into contracts and undertakings in reliance upon the former decision, would, in effect, have the obligations of their contracts impaired by the subsequent decision. Yet, the opinion filed in this case allows this court, in construing a Wisconsin statute, to vary the construction of a similar statute by the Wisconsin Supreme Court so as to deprive a litigant of the benefits of his contracts made perhaps in reliance upon such former decision. Does this court arrogate to itself power in construing the statutes of a state which in similar cases it has denied to the state supreme courts?

We have attempted to set forth the reasons why we believe the plaintiff in error is entitled to a rehearing of this case by this court. To us the rights of plaintiff in error seem clear. The arguments advanced by us in our original brief seem valid and do not seem to have been answered in any respect by the opinion of the court on file. For this very reason that the matter seems to us so clear, we have found it hard to frame in language at all satisfactory to us the reasons why we think the court's opinion erroneous.

We of course know that we may be wrong in our views on this controversy, but we very respectfully ask the court for a reconsideration of the questions involved, believing that it will conclude its former decision was a mistake.

Respectfully submitted.

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